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IN THE

Supreme Court of the United States

JAMES BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT AND MICHAEL CROSBY,
Petitioners,

vs.

JAMES McNALLY AND JAMES JOHNSON BEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents attempt to lull this court into denying this petition by mischaracterizing this as being just one more case about qualified immunity and alleged coercion. It is not. This case is about whether the remedy for *Miranda* violations should continue to be exclusion of improperly obtained evidence or about whether a new, civil remedy should be created. Unless reviewed, this case will nullify this Court's precedent establishing that Fifth Amendment violations occur only at trial, will compound confusion about the constitutional limitations on the police in conducting interrogations, and will signal to officers that they can no longer depend upon their state-certified training to avoid personal liability. Every case in which officers fail to follow *Miranda* procedures will become a potential civil rights trial on the issue of alleged coercion. Even worse, officers will either make individualized, personal judgments about constitutional limitations; or they will simply follow the safe course erring on the side of inaction. Crimes will not be solved. The guilty will not only commit perjury with impunity and go free; they will be rewarded with civil recovery. In short, the balance carefully struck by this Court during the last three decades will be destroyed. This Court should act now to protect that balance nationwide and to restore it in the Ninth Circuit.

I. Contrary To Respondents' Assertions, The Fifth Amendment Question Should Be Decided Now To Effectuate This Court's Precedent And Restore Uniformity In The Circuits.

Respondents argue that the issue of whether the Fifth Amendment can be violated at the station house need not be decided. They are mistaken. The Ninth Circuit entirely ignored this Court's precedent that the Fifth Amendment is a right that can only be violated at trial. And, neither the Ninth Circuit nor respondents make any attempt to reconcile this Court's rulings in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) and *United States v. Balsys*, 524 U.S. 666 (1998) with the assertion that the police can violate the Fifth Amendment at the station house during interrogation.

These cases and other Fifth Amendment jurisprudence establish that the suppression of a statement is the proper remedy for non-compliance with *Miranda* guidelines, and that a Fifth Amendment violation occurs only upon the erroneous admission of such a statement at trial. (See Petition pp.13-22). No Supreme Court case, however, holds that civil liability under the Fifth Amendment can result from station house interrogations. The instant petition presents an opportunity for this important issue to be decided

by this Court. [1]

II. Because The Interrogations In This Case Were Not 'Shocking To The Conscience,' The Detectives Should Not Be Civilly Liable Under Standards Governing The Admission Of Statements In Criminal Cases.

Based on the district court's review of the tape recorded interviews, the court concluded and granted summary judgment on the Fourteenth Amendment claim, stating that "[t]here is no evidence of behavior 'shocking to the conscience' in either case, or of conduct that is 'intentional, unjustified, brutal, and offensive to human dignity,' or that constitutes force that is 'brutal' and 'offends even hardened sensibilities.' " (Pet. App. B5).[2] The district court, however, believed

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[1] In a footnote respondents assert that review here would accomplish no practical result since a reversal would "permit the [dismissed] Fourteenth Amendment claim to proceed to trial." [Respondents' Opposition pp. 27-28 n. 18] Respondents fail to explain why this is so since the district court dismissed the Fourteenth Amendment substantive due process claim because the detectives did not engage in conscience shocking conduct.

[2] Even McNally admits that the police did not engage in "coercive" conduct. During a pre-trial telephone conversation in 1994, McNally telephoned Talbot to discuss the pre-trial probation officer's report and stated that Talbot had been "real honest" and "above board" with him. (Pet. App. G-20)

Ninth Circuit precedent required it to find the existence of a triable issue of material fact so as to preclude a finding of "qualified immunity" on respondents' Fifth Amendment claims. (Pet. App. B3-B4).

Denial of summary judgment on qualified immunity grounds was based on the district court's view that "when *Miranda* measures are ignored, a suspect's Constitutional rights are 'directly affected.' [citation] *A failure to comply with Miranda can be viewed as an aggravation of other coercive tactics.*" (Pet. App. B3, emphasis added) The district court ultimately denied summary judgment because, as Judge Rafeedie stated, "The Court believes this defense [qualified immunity] is foreclosed by the analysis set forth in *Cooper v. Dupnik*, 963 F.2d at 1250-51. (Pet. App. B6).

The only reason the district court believed that a triable issue of material fact existed is because of the over broad and meaningless test developed in *Cooper*.

However, as the dissent in *Cooper v. Dupnik* noted: "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." (emphasis in original) *Cooper,* 963 F.2d 1220, 1254 (9th Cir. 1992), (citing *Oregon v. Elstad*, 470 U.S. 298, 306 n.1] (Brunetti, J, dissenting). *Cooper*, according to the majority, purports to limit liability "where police officers continue to talk to a suspect after he

asserts his rights and where they do so in a benign way without coercion or tactics that compel him to speak." *Id.* at 1255. "This purported limit is illusory. The main point of the majority opinion seems to be that authorities' deliberate disregard of *Miranda* safeguards – that is, their failure to stop questioning Cooper when he requested a lawyer – lead to the coercion and Cooper's imprisonment in 'a totalitarian nightmare' ... When, then, in the majority's view would such a deliberate disregard of *Miranda* rights not represent 'coercion or tactics that compel him to speak?' " *Id.* at 1255.

III. The Novel Qualified Immunity Issue Presented By This Petition Is Whether Police Detectives Are Entitled To Rely On State Certified Training Or Whether They Are Expected To Form Their Own Judgments About Issues Of Constitutional Law.

Respondents argue that this case presents no novel issue of qualified immunity. Again, they are wrong. They dismiss the petitioners' entitlement to qualified immunity by suggesting that police departments can avoid liability by "simply training their agents to wilfully defy or disregard" clearly established constitutional rights. (Respondents' Opposition 25). This argument begs the question. Instead, this case concerns whether the "contours of the [asserted] right" was "sufficiently clear that a reasonable official would understand that what he [was] doing

violate[d] that right." *Anderson v. Creighton*, 483 U.S. 639 (1978).

Despite respondents' claim that the constitutional right at issue here has been clearly established for "over sixty years" (Respondents' Opposition 25), even today, there is considerable disagreement as to the contours of the Fifth Amendment right. [See Petition at 22-28 discussing conflict in the circuits.][3]

IV. In Order To Avoid Review, Respondents Mischaracterize The Record Which Shows That McNally And Bey Did Not Suffer The Brunt Of Any Unconstitutional Conduct.

A. McNally's Murder Confession Was Not Introduced At Trial And Was Not Considered At His Sentencing And The Admission Of Bey's Statements Was Harmless Error.

As the record clearly shows, McNally's murder confession was excluded *for all purposes*

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[4] Respondents correctly point out that the Second Circuit in *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994) followed the Ninth Circuit's analysis in *Cooper v. Dupnik*. *Weaver* was decided after the interrogations of both Bey and McNally, and further demonstrates the existence of a conflict in the circuits.

during his criminal trial. However, McNally persists in attempting to create the illusion that his post-invocation statement was used against him, thereby resulting in an alleged violation of his Fifth Amendment rights. During the criminal court sentencing hearing on January 18, 1995, McNally moved to strike portions of the probation report that referred to his inculpatory statements to the police, and asked that a new probation report be prepared without reference to those statements. (ER 133). He also opposed the district attorney's argument that the court should consider McNally's post-invocation murder confession as an aggravating factor of the crime. (ER 133-134). Thus, all the record establishes is that the prosecutor offered the post-invocation murder confession, not that the court used it for purposes of aggravating McNally's sentence. In denying McNally's motion to strike the probation report, the judge stated "The court will only consider those portions which the court feels is admissible[.]" (ER 140).

The record also shows that McNally's sentence was based on the violent nature of the crime, not on the prosecutor's reference to McNally's post-invocation confession. The court stated:

> Now with regard to your factors in mitigation, I don't see one factor in mitigation other than the fact that you made some statements to the police at the outset which were

> excluded by the court in terms of trial. With or without these statements, the evidence is fairly clear that the nature of the offense was such that a murder rather than a manslaughter was committed, but the jury nevertheless, in its view of the evidence, concluded that was a manslaughter. And, the court will have to abide by that finding. [ER146-147].

With regard to Bey's statements, although the criminal trial court admitted his statements for impeachment purposes, the California Court of Appeals properly held that the admission of the evidence was harmless error. The appellate court found the admission of the statements was harmless beyond a reasonable doubt because the record established overwhelming evidence of Bey's guilt. *People v. Bey*, 21 Cal. App. 4th 1623 (1993). Thus, the practical effect was that the statements were never "used" against him.

And even if the statements were "used" at trial, the officers had no control over the prosecutor who sought the admission of the statements, or the judge who ultimately ruled on the admissibility of the statements. It is fundamental that an officer is responsible only for his or her conduct and cannot be held responsible of the acts of others.

B. The District Court Concluded After Hearing The Interrogation Tapes That The Police Conduct Did Not Violate Norms Of Civilized Society.

Despite the impression respondents attempt to create concerning McNally's and Bey's interrogations, there is nothing in the record to support any finding of actual coercion.

As his tape recorded statement establishes, McNally's entire interrogation lasted a little over an hour, and was conducted in a businesslike tone. McNally did not cry or otherwise break down emotionally. Contrary to respondent's claim, no "physically threatening gestures" occurred. (Respondents' Opposition 1).

Bey's interrogation lasted approximately 15 minutes, during normal working hours. Even though Bey characterizes the interrogation as loud and threatening, which the Ninth Circuit improperly adopted, the actual tape recording negates the claim. (ER 292).

CONCLUSION

Police officers must be able to investigate brutal killings in a civilized manner that does not shock the conscience. The detectives here did that, and in fairness, they and other officers should not be exposed to personal liability for the actions of prosecutors and judges at trial. Nor

should they be exposed civilly when they follow their state certified training. The Ninth Circuit's decision should be reviewed to protect the ability of law enforcement officers as individuals to continue protecting all of us.

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